Calendar No. 1221

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CONGRESSIONAL OVERSIGHT OF EXECUTIVE AGREEMENTS

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

TO ACCOMPANY

S. 3830

NOVEMBER 18, 1974.—Ordered to be printed

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NOVEMBER 18, 1974.—Ordered to be printed

Mr. ERVIN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 3830]

The Committee on the Judiciary, to which was referred the bill (S. 3830) to help preserve the separation of powers and to further the constitutional prerogatives of Congress by providing for congressional review of executive agreements, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

AMENDMENTS

On page 7, in line 10 and line 11, strike the word "specific".

PURPOSE OF AMENDMENT

The purpose of the amendment, to strike the word "specific" in Section 4 of the bill, is to make clear that the bill would not deprive the President of any implied powers which he may have to make executive agreements.

PURPOSE

The purpose of this bill is to help to preserve the separation of powers and to further the constitutional prerogatives of Congress by providing for congressional review of executive agreements. Its provisions are simple. The bill recognizes that the concept of shared powers in the area of international agreements which the framers of the Constitution so carefully incorporated in Article II, section 2 of the Constitution, has been substantially eroded by the use of so-called executive agreements. In plain and clearly understandable language, the meas-

ure defines executive agreements and requires that the Secretary of State shall transmit each such agreement to both Houses of Congress. It provides that any such agreement which, in the opinion of the President, would be prejudicial to the security of the United States, if disclosed, shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives, under an appropriate injunction of secrecy. Under this injunction of secrecy, only the Members of both Houses of the Congress shall be permitted to inspect the document.

The bill further provides that each executive agreement transmitted to the Congress shall come into force and be made effective after 60 days, unless both Houses pass a concurrent resolution expressing disapproval of the executive agreement between the date it is transmitted to the Congress and the end of the 60-day period, or unless the terms of the agreement provide a later effective date. The bill defines "executive agreement" and further specifies the procedures to be followed when such agreements are transmitted to the Congress.

The Committee urges passage of S. 3830, which would go far toward enabling the Congress to exercise fully the "advice and consent" role in the making of treaties which the framers of the Constitution assigned it under Article II, section 2 of the Constitution.

Legislative History

This legislation was first introduced by Senator Ervin, Chairman of the Senate Committee on the Judiciary's Subcommittee on Separation of Powers, on April 11, 1972. Hearings on the bill, S. 3475, of the 92d Congress, second session, were held by the subcommittee on April 24 and 25 and May 12, 18, and 19, 1972, and subsequently were published. Thereafter the bill was reintroduced in substantially identical form in the 93d Congress, first session, as S. 1472; and on July 13, 1973, the Subcommittee on Separation of Powers reported the measure to the Committee on the Judiciary without amendment.

On July 30, 1974, Senator Ervin introduced S. 3830 which was referred to the Committee on Foreign Relations. On August 19, 1974, the Committee on Foreign Relations discharged S. 3830 and referred it to the Committee on the Judiciary. S. 3830 is substantially identical to S. 1472 except for the addition of Section 4 and certain technical language changes. Section 4 would have exempted from the applicability of the procedures set out in Section 1 of S. 3830, any executive agreements entered into by the President pursuant to a provision of the Constitution or prior specific authority given the President by treaty or law.

Committee Action

The Committee on the Judiciary in executive session unanimously approved S. 3830 with an amendment by Senator Hugh Scott on October 2, 1974. The amendment which was offered by Senator Scott struck the word "specific" from Section 4, line 10 and line 11 of the bill.

The word "specific" was removed from Section 4, line 10 and line 11 so that Section 4 would not be interpreted as depriving the President of any implied powers which he may have to make executive agreements.

Background and Discussion

1. The trend toward use of executive agreements

A principal instrument for the expanding role of the Executive, with its analog in a decreasing legislative role, is the use of executive agreements. Their use has spiraled in recent years. Under Article II, section 2 of the Constitution, the President "shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." No other express language to enter into international compacts exists in the fundamental law.

The subcommittee recognizes that other types of agreements do exist, and have been approved by the Supreme Court. Nevertheless, it is firmly of the opinion that policymaking in foreign affairs was never intended to be concentrated in one branch of the Government. It is a shared power, subject, as are other constitutional powers, to the "checks and balances"—that is, the principle of separation of powers—implicit in the Constitution. As Senator Ervin said in his opening statement in the hearings on executive agreements held in April and May of 1972, "* * * the most cursory reading of constitutional history reveals the intention of the Founding Fathers that the President was to be precluded from engaging in the making of any substantive foreign policy without the advice and consent of the Senate." The subcommittee is aware that the House of Representatives also has a foreign policy role in the exercise of its legislative powers under the Constitution. Our Constitution reflects a commitment to shared, not concentrated, power.

How far the Nation has strayed from the ideal of shared powers may be seen in the statistics relating to treaties vis-a-vis executive agreements. The preponderance of executive agreements over treaties is a fairly recent development. For example, during the year 1930, the United States concluded 25 treaties but only nine executive agreements. Those figures may be compared with an enumeration of executive agreements and treaties entered into during the post-World War II period, compiled by the Department of State:

NUMBERS OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS ENTERED INTO BY THE UNITED STATES DURING THE PERIOD JAN. 1, 1946 TO APR. 1, 1972

Year	Treaties	International agreements other than treaties	Year	Treaties	International agreements other than treaties
1946	19	139	1961	9	260
1947	15	144	1962	10	319
1948	16	178	1963	17	234
1949	22	148	1964	3	222
1950	11	157	1965	14	204
1951	21	213	1966	14	237
1952	22	291	1967	18	223
1953	14	163	1968	18	197
1954	17	206	1969	6	162
1955	7	297	1970	20	183
1956	15	233	1971	17	214
1957	9	222	1972 (to April 1)	7	31
1958	10	197			
1959	12	250	Total	368	5,590
1960	5	266			

It is doubtless true that some of these executive agreements have been made, at least ostensibly, pursuant to existing statute or treaty.

The Senate Foreign Relations Committee said in its report, "As the committee has discovered, there have been numerous agreements contracted with foreign governments in recent years, particularly agreements of a military nature, which remain wholly unknown to Congress and to the people." Senate Report No. 92–591, 92d Cong., 2d sess. 3 (1972). However, ample testimony is available to show that the executive branch believes it possesses an independent power to enter into certain international agreements without the slightest congressional participation. That belief strikes directly at the heart of the constitutional order; it is a claim rejected by the Supreme Court in the famous decision in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343, U.S. 579 (1952), a case that invalidated President Truman's seizure of the steel mills during the Korean conflict. It is, of course, true that the *Youngstown* decision did not deal directly with the conduct of foreign affairs, but, as Mr. Justice Black stated for the Court, presidential power "* * * must stem either from an act of Congress or from the Constitution itself." Id. at 585.

Article II of the Constitution, which delineates the executive powers, does not expressly state that the President has power to enter into international agreements other than treaties. The Supreme Court decisions that can be cited to validate a presidential power to enter into agreements other than treaties deal mainly with questions of federalism (under Article VI of the Constitution) rather than of separation of powers.

Accordingly, the constitutional question, at most, is unsettled with respect to agreements not subject to congressional action. If, however, the "Necessary and Proper" clause of Article I is given its plain meaning, all agreements other than treaties are always subject to congressional check. Article I, section 8, clause 18—the Necessary and Proper clause of the Constitution—encompasses all powers granted to any department or officer of the government. It is an unmistakable commitment to congressional supremacy—or, at the very least, equality—in the making of public policy.

American constitutional law recognizes, in the Constitution itself and in judicial opinion, three basic types of international agreements. First in order of importance is the treaty, an international bilateral or multilateral compact that requires consent by a two-thirds vote of the Senate prior to ratification. (Ratification itself is an action that is solely within the power of the Chief Executive, who may refuse to promulgate a treaty even after Senate approval.) Next is the congressional-executive international agreement, entered into pursuant to statute or to an existing treaty. Finally, there is the "pure" or "true" executive agreement, negotiated by the Executive entirely on his authority as a constituent department of government. As stated above, the Supreme Court decisions upholding these latter agreements deal solely with their superiority over State law under Article VI of the Constitution. There is no Supreme Court opinion recognizing them in the context of separation of powers.

It is the prerogative of the Executive to conduct international negotiations; within that power lies the lesser, albeit quite important, power to choose the instrument of international dialog. There is no

requirement in the Constitution or any existing statute that the treaty route be followed for any particular agreement. It is important to note that Congress is deeply involved only in treaties. Congressional-executive international agreements, which of course involve legislative action, may be analogized to the vague and nebulous delegations of power to administrative agencies. Power to conclude this middle type of agreement is ultimately derived from or dependent on Congress (either by statute or treaty), but, as with so many of the delegations of power to the agencies of public administration, the Executive is usually left with wide discretion within hazy and uncertain limits. As a matter of law, it is appropriate to mention that the Supreme Court has held that delegations of power that might be invalid domestically are "admissible" in foreign affairs. (See *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 1936). The power to choose is the power to govern, both in internal and external matters. Choice of the instrument of international accord is a subtle, but significant, means of aggrandizing Executive power at the expense of Congress. (Cf. Davis, *Discretionary Justice*, Louisiana State University Press, 1969).

Much of this is necessary, even desirable, but the slow and steady manner in which congressional power has been diminished is not. Ways exist whereby the undoubted merits of the flexible process of making international agreements with less than the formality of treaties can be maximized, while simultaneously permitting Congress to exercise its indubitable role in the conduct of foreign affairs. The passage of S. 3830, with the principles it embodies, could significantly further the goal of finding means whereby the urgent tasks of governing can be accomplished within the framework of the principle of separation of powers. However, it is of the highest importance to emphasize the continuing need for legislative scrutiny of the manner in which the Executive is conducting foreign relations. Merely enacting one statute will not suffice.

The Supreme Court has said that the President has "the very delicate, plenary, and exclusive power * * * as the sole organ of the Federal Government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States* v. *Curtiss-Wright Export Corp.*, *supra*, at 320. What that means, and all that it means, is that the President has the sole power of negotiating with other governments. It should not and cannot be taken to mean that the President has powers as Chief Executive that are not subject to the checks and balances of the legislative process. As noted previously, within his power of negotiation, the President may choose the instruments with which to formalize international accords, unless Congress chooses to direct him to follow one route (such a treaty) rather than others. That, quite clearly, lies within the legislative prerogative.

The State Department details the procedure to be followed in negotiating treaties and executive agreements in its 11 "Foreign Affairs Manual" 700, "Circular 175 Procedures," June 6, 1969.

By its terms, Circular 175 procedure applies only to the Department of State, and no testimony elicited during the hearings held in April

and May 1972, would indicate that it is applicable to other departments, offices, or subdivisions of the executive branch, which presumably operate outside the boundaries provided by its rather fuzzy guidelines. It is well known that other departments, such as the Department of Defense, for example, also enter into executive agreements. See *United States* v. *Seery*, 127 F. Supp. 601 (Ct. Cls., 1955) cert. den., 359 U.S. 943 (1959), for a decision involving an executive agreement concluded by an officer of the U.S. Army with Austria. It is clear beyond doubt that the circular does not provide a means of insuring congressional participation in international decisionmaking, and, moreoever, has no effect upon "commitments" that may be made by the President—commitments which may well direct the United States along a course of action that can have significant, even dire, consequences. For example, American participation in Indochina has been partly justified by a series of "commitments" made by several Presidents who acted without formal congressional action.

The basic problem in this area of executive agreements is that the Executive can, and ever increasingly does, pursue unilateral courses of action that can and do have portentous consequences for the United States. Such actions were directly contrary to the letter and spirit of the Constitution. Any such exercise of unfetered power constitutes a giant step along the road toward authoritarian government. The time is long overdue for the Congress to stop the trend, and to assert its constitutional prerogatives.

The "national commitments resolution" approved overwhelmingly by the Senate on June 25, 1969, was a step in that direction, but only a step, for, in and of itself, it cannot accomplish the necessary staying action on the flow of power to the Executive. That resolution, Senate Resolution 85, 91st Congress, first session, introduced by the late Senator Richard Russell, states:

> Whereas accurate definition of the term "national commitment" in recent years has become obscured: Now, therefore, be it
>
> *Resolved*, That (1) a national commitment for the purpose of this resolution means the use of the Armed Forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the Armed Forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States result only from affirmative action taken by the executive and legislative branches of the U.S. Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.

As Senator Fulbright said in his testimony before the subcommittee on April 24, 1972, the resolution "clearly indicates the kind of subject matter which should be covered by a treaty, or, if not by a treaty, by specific legislation for the purpose. Certainly it does not leave room for unilateral action by the executive branch in the formulation and conclusion of international agreements, as if our legislature, our representative form of government, and even our Constitution did not

exist." However, the resolution states no requirements and imposes no sanctions; it is hortatory rather than mandatory, and thus demonstrates the need for legislation such as S. 3830.

2. THE ARGUMENTS

Justification for wide and untrammeled employment of executive agreements was presented in testimony before the subcommittee by representatives of the executive branch and by legal scholars. These arguments may be reduced to two simple proportions: (*a*) That the President, as the Chief Executive, has constitutional authority to conclude some international agreements; and (*b*) that, because of the need to pledge the word of the United States and to deal with complex matters over short periods of time, it is essential for the Executive to be able to act flexibly and rapidly. Neither justification withstands careful scrutiny.

Certainly the Supreme Court has never expressly held that the President has power, independent of Congress, to conclude international agreements. Emphatically, a careful reading of the *Curtiss-Wright* case does not reveal the authority suggested by Assistant Attorney General Ralph E. Erickson's citation of that decision in stating before the subcommittee that "The President also derives power in his role as Chief Executive to make executive agreements based on attributes of the sovereignty of the United States." The Court has never dealt with the separation-of-powers question other than in the context of a delegation of congressional power, and that was the specific and, indeed, the only question in *Curtiss-Wright*. Nor does *United States* v. *Belmont*, 301 U.S. 324 (1937), or *United States* v. *Pink*, 315 U.S. 203 (1942), upon which the Justice Department also relies, help the Executive's position. Both decisions dealt solely with the question of federalism; that is, whether an executive agreement regarding ownership of assets of the Czar, made simultaneously with recognition of the U.S.S.R. by President Franklin D. Roosevelt, was superior to an inconsistent State law. What the Court held, and all that it held, is that executive agreements are sufficiently like treaties to be "the supreme law of the land" under article VI of the Constitution. The Court has never held that an executive agreement can override an inconsistent congressional action; and in *Reid* v. *Covert*, *supra*, Justice Black went out of his way to state that an international agreement, of whatever type, could not prevail over a constitutional provision.

There is, accordingly, little basis in law for the Executive's position, however much there may be in practice. On the contrary, the law as pronounced by the Supreme Court, as well as the intention manifest by the Founding Fathers in drafting our Constitution, makes foreign relations a shared power.

Furthermore, executive action here as in other areas, is subject to the express constitutional provision in article I, section 8, that Congress shall have power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers [in article I], and all other Powers vested by this Constitution in the Government of the United States, or *in any Department or Officer thereof*." (Emphasis added.) The Constitution could not have stated more clearly that the ultimate power is legislative. During the hear-

ings in April and May 1972, spokesmen for the executive branch, in particular, tended to minimize that provision; in the view of the subcommittee, their position is untenable.

As for the practical reasons for Executive power in the conduct of foreign relations, the argument is two-pronged. First, it is said that throughout American history the President has entered into agreements other than treaties—at times with congressional approval, and at other times without—a practice which is said to create constitutional law by custom. Second, in the words of Mr. John R. Stevenson, the legal adviser of the Department of State, in his testimony before the subcommittee, "The rapid expansion of the volume of international agreements * * * results from the obvious fact that improved communication and transportation, and the expansion of international trade and financial relationships, and international travel—in addition, of course, to expanded cooperation and assistance in a number of areas—have created a need for a wide variety of practical arrangements between governments." Mr. Stevenson mentioned that more than 1,000 of the present executive agreements deal with the sale of surplus agricultural commodities.

These arguments tend to prove too much. To say that a course of practice by past Presidents has established a basis in "customary constitutional law" for the present exercise of executive authority in areas beyond congressional power to influence or control, is to say that the fundamental law of the Nation can be changed irrevocably by methods other than amendment. Surely that is contrary to the letter and spirit of the Constitution. Improper executive action undertaken in the past cannot be employed as precedent for similarly improper actions today. As Mr. Justice Black said in the *Youngstown* case, *supra*, at 588, "It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this is true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution in the Government of the United States, or *any Department or Officer thereof.*" (Emphasis added.) That same argument was used, for example, when the subcommittee was considering impoundment of funds by the White House. The chairman pointed out then, and surely it is equally valid now, that the mere fact that other Presidents have flouted the will of Congress and gotten away with it, cannot now become precedent for present action of a similar nature. To allow that to occur would mean that Congress would bow supinely to the Executive, and permit immense changes in the Nation's constitutional structure without following the pattern dictated for such changes. That Congress cannot do, if it is to retain—or to regain—its status as an important branch of American Government.

The subcommittee recognizes the force and effect of the arguments propounded regarding the "practical" reasons for permitting great latitude to the President in his choice of instruments for international intercourse. There can be no doubt that the deeper and wider immersion of the Nation in world affairs during the past 60 years has escalated the requirement for more and more international agreements. Although the world has indeed become a "global village" and American

interests literally circle the planet and extend far into space, the exponential growth in international agreements and the complexity of international affairs cannot serve as an excuse for foreclosing the Congress from exercising an active and continuing influence in determining the Nation's international policies. The arguments made by spokesmen for the Executive lead to the constitutionally unacceptable conclusion that Congress should take a permanent back seat and allow the executive the unchecked power to govern as it sees fit. The Founding Fathers well understood the tendency of men to err, and they wisely built into the constitutional framework the doctrine of separation of powers in order to curb those tendencies. Any time that doctrine is permitted to erode, the Constitution itself wastes away.

Stemming the trend toward executive domination need not hamper the executive branch in accomplishing the urgent tasks of government. Indeed, full and open public debate on both domestic and international public policies is essential if we are to accomplish the goal of good government. In meeting that goal, the Congress must take more than a sporadic ad hoc glance at our foreign policy. A thoroughgoing congressional consideration and articulation of our security posture, and of our foreign policy goals in general, are essential if the people are to be represented in the development of national goals in the international arena. However, congressional procedures must be modernized in order for Congress to exercise a continuing supervision over both the thrust and the details of foreign affairs.

3. THE APPROPRIATE LEGISLATIVE ROLE IN FOREIGN POLICY

While an active congressional role in the establishment of national foreign policy raises certain difficulties in terms of efficiency, it is plain that the Constitution requires that the Congress not be foreclosed from its rightful supervisory role in the area of foreign affairs. Certainly the constitutional provision that the President's power to enter into treaties with foreign nations is to be exercised "by and with the Advice and Consent of the Senate * * *, provided two-thirds of the Senators present concur" constitutes more than a moral exhortation of no legal consequence. Indeed, any reading of the Constitution reveals an intent that Congress should exercise substantial power over the Nation's external affairs; for example, article I, section 8, grants Congress the power to regulate commerce with foreign nations, to declare war, to raise and support armies, and to provide and maintain a navy, all powers inextricably linked with the Nation's external relations.

History teaches us that the Founding Fathers visualized a Hobbesian world where "men are selfish and contentious. They (the Founding Fathers) were men of affairs, merchants, lawyers, planter-businessmen, speculators, investors. Having seen human nature on display in the marketplace, the courtroom, the legislative chamber, and in every secret path and alleyway where wealth and power are courted, they felt they knew it in all its frailty. To them a human being was an atom of self-interest. They did not believe in man, but they did believe in the power of a good political constitution to control him." Hofstadter, supra, p. 3.

Madison put it well in "The Federalist No. 51" [50] (Cooke ed. 1961):

> Ambition must be made of counteract ambition * * *. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels no government would be necessary * * *. If framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

That most fundamental view is the core of the U.S. Constitution.

In his opening statement at the subcommittee's hearings on S. 3475, Senator Ervin emphasized the historical rationale underlying the separation-of-powers doctrine, noting that even Alexander Hamilton, a leading advocate of a strong Executive, feared the dangers inherent in placing the conduct of foreign affairs in one branch, and pointed out that it was a shared power. Senator Ervin then quoted Hamilton, who, speaking of the "intermixture of powers in this field," in "The Federalist No. 75" [74] (Cooke ed. 1961), said:

> * * * The particular nature of the power of making treaties indicates a peculiar propriety in that union (the Senate and Executive). Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. * * * The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.
>
> However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration. * * * The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

Because it places the formulation of foreign policy among the shared powers, the Constitution necessarily invites struggle between the executive and legislative branches regarding the privilege of directing

foreign affairs. That struggle has been manifest during many periods of American history, but never more strikingly than at the present time. Recent congressional efforts to curtail executive power are reflected in bills introduced during the 92d and 93d Congress. Their introduction certainly reflects the growing concern of numerous Members of the Congress regarding the diminution of congressional powers and the propensity of the executive unilaterally to commit the Nation to the most far-reaching foreign policy positions.

S. 3830, as introduced, states a goal of constitutional government, one that was aptly put by Mr. Justice Jackson in his concurring opinion in the *Youngstown* case, supra, at 655: "With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the executive be under the law, and that the law be made by parliamentary deliberations."

4. THE NECESSITY FOR THE SEPARATION OF POWERS

Concurring in the *Youngstown* case, Justice Frankfurter gave effective voice to the built-in, but highly necessary, impediments to "efficient" government placed in the Constitution, supra at 593–594:

> A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it eaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.
>
> To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power * * *. The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

In summation, much of the conduct of American foreign relations is *terra incognita*, for there are few precise principles to guide its exercise or to delineate the authority to be exercised by the legislative

and executive branches. The increase in executive control has resulted from the necessity that foreign policy be made efficiently at some level. It is not the result of a conspiracy to foreclose the Congress from its rightful role, but rather of the need to fill a power vacuum. However, in permitting the executive branch to assume and exercise even greater control over foreign policy, the Congress has allowed the constitutional provisions to be bypassed and traditional constitutional interpretation to be severely warped. Clearly the pendulum has swung too far, and Congress must move to redress the balance of power. If the Executive is permitted to continue its dominance, no matter how justified individual actions may seem, the Congress will become increasingly a mere forum for the expressions of moral sentiments of little lasting value.

Public policy in the United States no longer can be sharply split between "domestic" and "foreign." Most domestic policies have foreign aspects or overtones, and vice versa. The line between the two has always been blurred—much more so than many believe—and now it is being erased altogether by fast-moving events in the world community. Congress must not fail to act to reestablish its voice in the making of policy, for the very constitutional order of our Nation is in jeopardy if the most direct representatives of the people become mere factotums of the President. The enactment of S. 3830 is essential to the goal of restoring to the Congress its rightful role in the making of foreign policy.

Section-by-Section Analysis

Section 1 establishes the procedure by which executive agreements shall be transmitted to the Congress for approval or disapproval.

Subsection 1(a) provides that any executive agreement shall be transmitted to the Secretary of State, who shall then transmit such agreement to the Congress. The subsection also provides a method for preserving secrecy when, in the opinion of the President, disclosure of an executive agreement would be prejudicial to the security of the United States. In such a case the Secretary of State shall transmit such agreement to the Committee on Foreign Relations of the Senate and the Committeee on Forign Affairs of the House of Representatives under an appropriate written injunction of secrecy to be removed only upon notice from the President. Each Committee must personally notify the Members of its House that the Secretary of State has transmitted the agreement with an injunction of secrecy, and the agreement shall thereafter be available for inspection only by such Members.

Subsection 1(b) provides that any such executive agreement shall come into force with respect to the United States at the end of 60 calendar days of continuous session after the date on which the executive agreement is transmitted to the Congress or such committees, as the case may be, unless, during such 60-day period, both Houses agree to a concurrent resolution stating in substance that both Houses do not approve the executive agreement.

Subsection 1(c) provides that, for purposes of Subsection 1(b), continuity of session is broken only by adjournment of Congress *sine die*, and excludes from the computation of the 60-day period all days

on which either House is not in session because of an adjournment of more than three days, to a day certain.

Subsection 1(d) recognizes that provisions contained in the executive agreement may require that the agreement come into force at a time later than the date on which the agreement comes into force under subsections 1(b), and 1(c).

Section 2 defines "executive agreement" as "any bilateral or multilateral international agreement or commitment, other than a treaty, which is binding upon the United States and which is made by the President or any officer, employee, or representative of the executive branch of the United States Government."

Section 3 deals with procedure to be used when agreements are transmitted to the Congress.

Subsection 3(a) specifies that section 3 is enacted by Congress as an exercise of the rulemaking power of each House respectively, and recognizes the constitutional right of either House to change its rules or procedures.

Subsection 3(b) sets out the language to follow the resolving clause in a concurrent resolution, and provides that this section does not include a concurrent resolution which specifies more than one agreement.

Subsection 3(c) requires a concurrent resolution with respect to an executive agreement shall be referred to a committee by the President of the Senate or by the Speaker of the House of Representatives, as the case may be.

Subsection 3(d) specifies that if the committee to which a concurrent resolution with respect to an executive agreement has been referred has not reported it at the end of 20 calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the concurrent resolution or to discharge the committee from further consideration of any other concurrent resolution with respect to the executive agreement which has been referred to the committee. A motion to discharge may be made only by an individual favoring the concurernt resolution, and such a motion is highly privileged, with debate thereon being limited to one hour, equally divided between those favoring and those opposing the resolution. Neither an amendment to the motion nor a move to reconsider the vote by which the motion is agreed to or disagreed to is in order. If the motion to discharge is agreed to, or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other concurrent resolution with respect to the same executive agreement.

Subsection 3(e) provides that when the committee has reported, or has been discharged of further consideration of, a concurrent resolution with respect to an executive agreement, it is in order at any time thereafter to move to proceed to the consideration of the resolution. Such a motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. Debate on the concurrent resolution shall be limited to not more than ten hours, divided equally between those favoring and those opposing the resolution. An amendment to, or a motion to recommit, the concurrent reso-

lution is not in order, nor is it in order to move to reconsider the vote by which the current resolution is agreed to or not agreed to.

Subsection 3(f) provides that motions to postpone, made with respect to the discharge from committee, or the consideration of a concurrent resolution with respect to an agreement, and motions to proceed to the consideration of other business, shall be decided without debate, and appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a concurrent resolution with respect to an executive agreement shall be decided without debate.

Section 4 provides that the provisions of Section 1 shall not apply to any executive agreements entered into by the President pursuant to a provision of the Constitution or prior specific authority given the President by treaty or law. The word "specific" in Section 4, line 10 and line 11, was struck by amendment offered in the Committee deliberation on October 2, 1974.

Similar Legislation

A similar bill, S. 596, was introduced by Senator Case in the 92nd Congress in February 1971, and was enacted as Public Law 92-403, 1 U.S.C. § 112b. The provisions of 1 U.S.C. § 112b require reporting of executive agreements to the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs, but do not provide a method for the Congress to disapprove an executive agreement as does S. 3830. The report of the Committee on Foreign Relations to accompany S. 596 stated:

> The bill does not undertake to resolve fundamental questions relating to the treaty power of the Senate and the frequently countervailing claim—or simple use—of executive authority to enter into binding agreement with foreign countries without the consent of Congress. S. 596 undertakes only to deal with the prior, simpler, but nonetheless crucial question of secrecy. (S. Rept. No. 591, 92nd Cong., 2nd Sess. 3.)

Although S. 596 did not deal with the underlying constitutional question of the Senate's treaty power, the report recognized the bill "* * * may well be interpreted * * * as an invitation to further consideration of this critical constitutional issue."

S. 3830 preserves the provision of 1 U.S.C. § 112b which prevent secrecy in the making of executive agreements by requiring that they be reported to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives. S. 3830 goes a step farther and addresses the crucial constitutional issue of the role of Congress in the making of international agreements by providing a method for Congress to disapprove executive agreements. This provision, combined with the reporting requirements, would prevent the use of executive agreements to bypass the treaty-making provisions of the Constitution. Thus, S. 3830 is an important step if Congress is to be successful in reasserting its proper role in the making of international agreements.

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